IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21 .07.2005

CORAM:-

THE HONOURABLE MRS. JUSTICE R. BANUMATHI

Civil Revision Petition (PD)NO. 857 of 2004

and

C.M.P. No. 8162 of 2004

Umamaheswari .. Petitioner/ Respondent

Vs.

K. Babu .. Respondent/ Petitioner

Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 30.12.2003 made in I.A.No. 1368 of 2003 in H.M.O.P.No.540 of 2001 on the file of the Family Court, Coimbatore.

For Petitioner : Mr. J. Ramakrishnan
For Respondent : Ms. P.T. Asha

ORDER

This Revision is preferred against the order of the Family Court, Coimbatore made in I.A. No. 1368 of 2003 in H.M.O.P. No. 540 of 2001, dated 30.12.2003 allowing the application filed under Order VI Rule 17 of C.P.C. permitting the Petitioner/Husband to amend the petition. Respondent/Wife is the Revision Petitioner.

2. Marriage between the Revision Petitioner and the Respondent was solemnised as per Hindu Rites and Customs on 30.11.1998. The spouses were living in the house of the Respondent/Husband. H.M.O.P.No.540 of 2001 has been filed for divorce. Case of the Respondent/Husband is that while the Revision Petitioner/ Wife was living with him, she had no intention to consummate the marriage. She did not co-operate with the Respondent/ Husband in conjugal obligation during three months of

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their matrimonial life. In February 1999, the Revision Petitioner/ Wife was going along with her mother for medical check up. But the Revision Petitioner/ Wife and her mother did not tell anything about their conversation with the Doctor. After finishing medical check up, she was staying with the Respondent/ Husband in his house for two days. Thereafter, she left for her parents house without giving any intimation to the Respondent/ Husband and then she did not return back to the matrimonial house. She had also taken away all her jewels, valuable sarees and other valuable things. For about two and half years, the Revision Petitioner/ Wife has not resumed her family life. When the Respondent/ Husband had contacted to bring her back, he was insulted by her father on many occasions. In the petition, it is alleged that the Revision Petitioner/ Wife is sterile and since she has left the matrimonial house for about two and half years i.e. from February 1999, it amounts to desertion on the part of the Revision Petitioner/ Wife. On the ground of cruelty, sterility, desertion and on non consummation of marriage, the Respondent/ Husband has filed the petition for divorce in H.M.O.P.No.540 of 2001. The said petition was filed under Section 13 (1)(i-a) of Hindu Marriage Act.

3. The Revision Petitioner/ Wife has filed the counter statement contending that she was happily living with the Respondent/ Husband for about two years. According to her, she is the "முறை பெண்" of the Respondent/ Husband and the marriage was performed as per their wish and it was an arranged marriage. The Revision Petitioner/ wife could not procreate a child; her mother insisted to take her to hospital. But the Respondent/ Husband was denying permission even to see her parents. The Respondent/ Husband had beaten the Revision Petitioner/ Wife and was treating her cruelly. Despite the request from the parents of the Revision Petitioner/ Wife and the Village elders, the Respondent/ Husband was not willing to take her back. In her counter statement, the Revision Petitioner had expressed her willingness to live with her Husband.

4. The main petition was pending enquiry. At that stage, the Respondent/ Husband has filed I.A.No.1368 of 2003 for amendment of the petition :-

(i) To amend the petition by adding Section 13(1)(i-b)of Hindu Marriage Act 1955;
(ii) To substitute the word "impotency/Impotent" instead of "sterility/sterile".

In the supporting affidavit, the Respondent/Husband has alleged that due to omission, the relevant Section for Desertion was not included in the petition. It is further alleged that the Revision Petitioner/ Wife was not showing any interest in the family life.

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After the medical check up, she has abruptly left the matrimonial home without any cause thereby deserting him. According to the Respondent/ Husband 'Impotency' means incapacity to consummate the marriage. Under the said circumstances, the Respondent/ Husband has filed this application to amend the word "sterility" with the word "impotency" and had also sought for amendment to include Section 13 (1)(i-b) of Hindu Marriage Act.

5. Resisting the application for amendment, the Revision Petitioner/ Wife has filed the counter statement strictly denying her impotency. The application for amendment had been filed belatedly to fill up the lacunae in the main petition. It is alleged that the medical certificate filed by the Wife would prove that she is fit for sexual intercourse and also fit for matrimonial life.

6. Upon consideration of contentions of both parties, the learned Judge, Family Court has allowed the amendment application interalia finding that omission to include Section 13 (1)(i-b) of the Hindu Marriage Act is not a serious mistake but only an inadvertent mistake and that inclusion of Section 13 (1)(i-b) would not change the nature of the petition. The learned Judge accepted the plea for amendment to substitute the word 'Impotent' instead of the word 'sterile' . In the view of the trial Court, the word 'sterile' has been mistakenly used and therefore by allowing the proposed amendment, no prejudice would be caused to the Revision Petitioner/ Wife.

7. Aggrieved over the order of allowing the amendment application, the Revision Petitioner/ Wife has filed this Revision. The learned counsel for the Revision Petitioner/ Wife has submitted that the proposed amendment has been sought for nearly after two years when the case has been posted for trial. Drawing the attention of the Court to the averments in the petition, the learned counsel for the Revision Petitioner has submitted that the Husband has only alleged suspicion regarding the Revision Petitioner's capability for sexual intercourse and matrimonial life and that suspicion may not be a ground for amendment of the main petition substituting the word 'Impotent'. Submitting that the Revision Petitioner/ Wife is fit for consummation, the learned counsel for the Revision Petitioner has contended that even according to the Respondent/ Husband, the defect was only a curable defect and that there is no reason for alleging impotency. Assailing the impugned order, the learned counsel for the Revision Petitioner has submitted that the order of allowing the amendment application suffers from material irregularity since the Court below had not properly appreciated the proposed amendment which seeks to introduce a new case.

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8. Drawing the attention of the Court to the averments in the petition, the learned counsel for the Respondent/ Husband has submitted that sufficient averments have been made to substantiate the plea of desertion and that the inclusion of the Section for desertion is only formal and that no valid objection could be raised. Submitting that the expression 'Sterility' could be substituted as 'Impotency'. The learned counsel for the Respondent/ Husband has submitted that in consideration of the averments in the petition, the trial Court has rightly ordered the amendment petition and that the impugned order does not suffer from any infirmity warranting interference.

9. Whether the order of allowing the proposed amendment amending the main petition in HMOP No. 540 of 2001 permitting the Husband to include Section 13 (1)(i-b) of the Hindu Marriage Act and permitting him to substitute the word 'Impotency' instead of 'Sterility' suffers from material irregularity is the main point that arises for consideration in this Revision.

10. The main petition in HMOP No. 540 of 2001 was filed on 1.10.2001. The amendment application in I.A.No.1368 of 2003 was filed on 23.9.2003. The amendment application is said to have been filed when the main case was posted for trial. The proposed amendment is assailed on the ground that it has been filed belatedly. Mere delay in making the application for amendment is not a ground for refusal of the amendment. Allowing amendment is discretionary; amendment application if filed at a late stage, it cannot be granted as a matter of course. But to do full and complete justice, the Court exercising its discretion may allow the amendment. Mere delay in filing the amendment petition by itself is no ground for dismissal of the amendment petition.

11. The amendment could be disallowed if it introduces a totally different, new and inconsistent case or its effect is to change the character of the petition/suit. It is to be seen whether the proposed amendment introduces a new plea in contradiction to the original pleading and whether it introduces a new case. The petition for divorce has been filed under Section 13 (1)(i-a) - on the ground of cruelty. Now by the proposed amendment, the Respondent/ Husband seeks to introduce the ground of desertion by including the Section 13(1)(i-b)of the Hindu Marriage Act.

12. The main point for consideration is whether the inclusion of Section 13 (1)(i-b) introduces a new case or whether it reflects only the original pleading.

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13. Drawing the attention of the Court to the averments in the petition, the learned counsel for the Respondent/ Husband has contended that there are sufficient averments in the main petition alleging desertion. Referring to the desertion in para-4 of the petition it is stated that " when the Respondent left her parent, she took away her jewels, some valuable sarees, other valuable things and marriage video, cassette, photos, the incident has happened during February 1999 and even after two and half years the Respondent has not resumed her family life".

14. According to the Respondent/ Husband, he has made attempt to take her back but she has not turned back. Allegations are made to that effect in para-5 as "The petitioner made innumerable attempts to take the Respondent for the past 2 ½ years to his matrimonial home for the purpose of cure the defects but, everything went in vain".

15. Similarly in para-11, which refers to the cause of action, it is alleged that " after two days, the Respondent returned to her parents house and never returned till date and where the Petitioner's residence at Coimbatore". Thus sufficient averments are made regarding the desertion. The merits of those averments relating to desertion is to be seen only at the time of trial.

16. The inclusion of Section 13 (1)(i-b) of the Act amounts to amendment on the same set of averments. The first Para of the amendment viz., to include Section 13(1)(i-b) does not introduce a new set of facts nor does it introduce a new plea. In that view of the matter, the order of the Family Court permitting amendment to include Section 13 (1)(i-b)- desertion as a ground of divorce is to be confirmed.

17. The next limb of amendment sought for is to substitute the word 'Impotent' instead of the words sterility/sterile wherever it is found in the main petition. According to the Respondent/ Husband, the Wife was not fit for matrimonial life/ sexual intercourse and that the marriage was not consummated. According to him, the word sterility/sterile has been mistakenly stated and that the same is to be substituted with Impotent/Impotency.

18. To appreciate the merits of the contention, it is necessary to refer to the averments in the petition. In para-2 of the Petition it is alleged that the Wife did not co-operate with the Petitioner / Husband in conjugal obligations. ..... Petitioner also did not compel the Respondent/ Wife for sexual intercourse during three months of matrimonial life. In para-3 of the petition, it is further alleged that the Revision Petitioner/ Wife was taken for medical check up and after medical check up, the

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Revision Petitioner/ Wife - her mother did not disclose the conversation between them with the daughter. In the cause of action paragraph - para-11 also, it is alleged that the Respondent lived together without consummating the marriage and later on when the Petitioner/Husband suspected sterility. Thus, definite allegations are levelled that the marriage was not consummated. No allegations have been made that the Revision Petitioner/ Wife is unfit for sexual intercourse. Impotency means physical/ practical impossibility to perform sexual act in a complete and perfect manner. Making allegations that a person is impotent is something serious having serious implications. In the absence of definite averments regarding impotency, the amendment cannot be allowed in a casual manner.

19. In P. Ramanatha Aiyer's The Law Lexicon Second Edition 1997, the meaning of Sterility is given as :

> "Sterility. Barrenness; incapacity to produce a child. It is curable and incurable. When of the later kind at the time of marriage, and arising from impotency, it is a good cause for dissolving a marriage. (1, tomlin's Med. Leg. 254)".

In the Concise Oxford Dictionary - Tenth Edition, the meaning of Sterile has been given as:-

> "Sterile. Not able to produce children or young (of a plant) not able to produce fruit or seeds. (of land or soil) ....."

In the Law Lexicon Second Edition 1997, the meaning of impotency is stated as :-

> Impotency. Incapacity for sexual intercourse.
> IMPOTENCY . ' Impotency,' as a cause for divorce, means an incurable defect, and not every temporary or occasional incapacity, but permanent and lasting inability for copulation and procreation.
> The word ' barrenness' is in no sense the synonym of impotency.'
> Incapacity for sexual intercourse is an essential ingredient of impotency. Such an inability may arise from a variety of causes including the mental and moral disability. (Jagdish Kumar V. Sita Devi, AIR 1963 Pun 114, 115. (Hindu Marriage Act (1955) S.12(1)(a)."

In the Oxford Dictionary, the meaning of 'Impotency' is stated as :-

"Impotent. (of a man) abnormally unable to achieve

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an erection or orgasm".

Impotency is the lack of ability to perform full and complete sexual intercourse. On the other hand, sterility is the incapacity to produce a child. The word 'Sterility' cannot be equated with the word 'Impotency.' Both the expressions are not interchangeable. Impotency is the incapacity for sexual intercourse which has got serious implications. Substituting the word 'Impotency' for 'Sterility' would cause serious prejudice to the Revision Petitioner/ Wife. In the absence of definite pleading that the Revision Petitioner/ Wife was sexually impotent or that she was incapable for sexual intercourse, the word 'Impotent/Impotency' cannot be substituted for the word 'Sterile/Sterility'. Substitution of the word 'Impotency' for 'Sterility' completely changes the original plea. It would alter the nature and character of the petition. Considering the meaning of both the expression and the implications on the contention of both parties, the learned Judge, Family Court ought not to have allowed the second limb of the amendment sought for. The impugned order allowing the amendment substituting the word 'Impotent/Impotency' instead of the word 'Sterile/Sterility' cannot be sustained and has to be set aside.

20. For the forgoing reasons, the order of the Family Court, Coimbatore made in I.A. No. 1368 of 2003 in H.M.O.P. No. 540 of 2001, 30.12.2003 is confirmed only regarding the first limb of the amendment - i.e. Regarding the amendment for inclusion of Section 13 (1)(i-b) of Hindu Marriage Act. The order of allowing the second limb of amendment substituting the word 'Impotency/Impotent' instead of 'Sterility/Sterile' is set aside. This Revision Petition is partly allowed. In the circumstances of the case, there is no order as to costs. Consequently, C.M.P. No. 8162 of 2004 is closed.

The Petitioner/ Husband is to be directed to file the amended petition. On filing such amended petition learned Judge of Family Court, Coimbatore is directed to afford sufficient opportunity to the Respondent/ Wife to file additional counter, if any.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To
1. The Judge,
   Family Court,
   Coimbatore.

2. The Record Keeper, V.R. Section,
   High Court, Madras.

1 cc to M/s. Saravabhuman Associates, SR. 30166
1 cc to Mr.J.Ramakrishnan, Advocate, SR. 30228

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